Supreme Court, U.S.
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No. 97-1779

In The

Supreme Court of the United States

October Term, 1997

ALAN RICHARDS, *et al.*,
JOHN R. NORTON, III, *et al.*,

Petitioners,

vs.

LLOYD'S OF LONDON, an unincorporated association, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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The Brief of Respondent Lloyd's in Opposition ("Opposition" or "Opp.") makes no genuine attempt to refute that the Questions Presented: (a) have never been resolved by this Court; and (b) raise concerns warranting immediate review. *See* Petition for Writ of Certiorari ("Petition" or "Pet.") at 11-16. Indeed, the Opposition actually underscores the far-reaching importance to future litigants of an immediate resolution of those three issues.

1. Lloyd's says that, under *Scherk*, a court may not void choice clauses under the anti-waiver provisions of the federal securities statutes "simply because the purchase of a 'security' is alleged." Opp. 11; *see also id.*, 1, 2, 6, 9, 10, 12, 14. Mere allegations, Lloyd's contends, leave "uncertainty" as to whether the securities laws apply, and, accordingly, cannot form a basis for voiding choice clauses under the anti-waiver provisions. *Id.*, 10-11, 16. But Petitioners did *not* merely allege securities violations. They presented *undisputed evidence* demonstrating that Lloyd's offered and sold securities in the United States in violation of United States securities law.[1]

It is critically important for the Court to explain in this case that where, as here, plaintiff makes a prima facie *evidentiary* showing that supports his securities allegations, the district court must, under the anti-waiver provisions, refuse to enforce choice clauses until plaintiff has an opportunity to prove his securities allegations in a plenary trial proceeding. Some lower courts follow this procedure under *Bremen*.[2] The district court and the

1. Lloyd's has never disputed any of Petitioners' evidence. Indeed, Lloyd's never argued in the district court that it did not sell securities to Petitioners. It asserted its "vigorous dispute" on that issue (Opp. 1, 6) only on appeal, but then conceded that the issue was not before the appellate court. *See* Pet. 4 & n.6.

2. *See New Moon Shipping Co. v. Man B&W Diesel AG*, 121 F.3d 24, 28-29 (2d Cir. 1997) (under *Bremen*, prima facie showing of unreasonableness (Cont'd)

Ninth Circuit, however, refused to do so. *See* Pet. App. A, 7a n.2 (failing to determine whether plaintiffs made a sufficient prima facie showing of a securities transaction); *see also* Opp. 1. If the Court does not resolve this issue now, courts will be free to claim "uncertainty" — and thereby effectuate a judge-made exception to the anti-waiver provisions — merely by declining to rule on the adequacy of plaintiff's proof, as the district court and Ninth Circuit did here.[3]

The issue whether district courts may enforce forum selection clauses despite a prima facie showing of unenforceability is important in *both* securities cases *and* non-securities cases. *See New Moon*, 121 F.3d at 26 (admiralty claims of negligence and breach of contract); *Weidner*, 859 F.2d at 1302 (RICO, fraud and other common law torts, and breach of contract). This Court has never given the lower courts guidance on this important issue. *New Moon*, 121 F.3d at 28 ("The leading

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(Cont'd)
is sufficient to defeat a motion to dismiss based on forum selection clause; upon such showing, plaintiff is entitled to plenary trial to prove unreasonableness); *accord Weidner Communications, Inc. v. Al Faisal*, 859 F.2d 1302, 1306 and nn.6-7 (7th Cir. 1988). Lower courts have followed the same procedure in deciding motions to dismiss for lack of personal jurisdiction. *See, e.g., Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1319 (9th Cir. 1998); *Nelson ex rel. Carson v. Park Indus., Inc.*, 717 F.2d 1120, 1123 (7th Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984).

3. The SEC sees no uncertainty. The SEC staff informed Lloyd's in the 1980s that Lloyd's must comply with United States securities law, because soliciting Americans to become Names constitutes an offer of securities. *See* evidence cited in Br. of the SEC, Amicus Curiae (9th Cir. May 1996) ("SEC Br."), Pet. App. L, 123a. *See also* Mem. of the SEC, Amicus Curiae, on Pet. for Reh'g and Suggestion for Reh'g *En Banc* (9th Cir. May 1997) ("SEC Reh'g Mem."), App. M, *infra*, 12a-13a.

Supreme Court cases have done little to resolve this procedural dilemma").[4] The Court should do so now.[5]

2. Lloyd's says that the Court's unmistakable condemnation in *Mitsubishi* of choice clauses that in tandem waive substantive federal statutory rights is mere dictum, and is limited to actions alleging antitrust violations. Opp. 21.[6] This narrow reading of *Mitsubishi* — which the Ninth Circuit *en banc* majority adopted — illuminates the critically important issue underlying Question No. 2 (Pet. i): where Congress has enacted *any* federal remedial legislation (such as the antitrust

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4. *See also* Linda S. Mullinex, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 281, 305 (1988) ("federal courts, in their eagerness to embrace this simple doctrine, have failed to develop a clear and appropriate method for its implementation").

5. *Scherk* did not hold, as Lloyd's contends, that an unadjudicated "uncertainty" as to the applicability of the securities laws requires enforcement of choice clauses. As *McMahon* makes clear, *Scherk* construed the anti-waiver provisions of the 1934 Securities Exchange Act to permit enforcement of an arbitration clause *only* because the clause preserved substantive rights under the 1934 Act. *See McMahon*, 482 U.S. at 229-32; *Scherk*, 417 U.S. at 519 n.13. *McMahon* also makes clear that Lloyd's is wrong in suggesting (Opp., 11) that, under *Scherk*, courts may enforce choice clauses in international transactions more liberally than choice clauses in wholly domestic transactions. *McMahon* eliminated any distinction between international and domestic transactions. *See* Pet. at 15 and authorities cited in n.27. Lloyd's Opposition does not address *McMahon*'s explanation of *Scherk*.

6. In a similar vein, Lloyd's suggests that *Vimar*'s explicit adoption of *Mitsubishi*'s purported "dictum" did no more than extend *Mitsubishi*'s rationale to cases arising under the Carriage of Goods by Sea Act. Opp. 22. Lloyd's does not discuss the confusion in the appellate courts as to the applicability of *Mitsubishi* to cases arising under statutes other than the antitrust laws. *See* Pet. 23.

laws *or* the securities laws *or* RICO) to curb nationwide abuses that compromise American markets, may courts disregard Congress' will by enforcing choice clauses that waive compliance with the remedial legislation? This issue will inevitably recur in the lower courts,[7] and the Court should decide it now.

3. Lloyd's says that, under *Moseley*, courts may not void choice clauses on grounds of fraud where, as here, plaintiffs show only that defendant inserted the choice clauses in the parties' contract as a means of getting away with a fraudulent scheme. Opp. 25-26. According to Lloyd's, a court may void choice clauses based on fraud only if, as the Ninth Circuit required, plaintiff presents evidence that defendant engaged in deception as to the existence or legal effect of the clauses. Opp. 25. *Moseley*, however, did not say, or even hint, that such deception is required on top of proof that the clause was intended to — and does — effect a scheme to defraud. Pet. 24-26. Neither did the Sixth Circuit impose such a requirement in *CBS Employees*.[8] This case presents the Court a unique opportunity to explain the nature and quantum of proof necessary to satisfy the *Moseley* standard. It is now time, 35 years after *Moseley*, for the Court to do so.[9]

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7. *Cf. Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994) (refusing to enforce arbitration clause that waived substantive rights under the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-06).

8. *CBS Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 912 F.2d 1563 (6th Cir. 1990).

9. Lloyd's also suggests that principles of international regulatory comity require enforcement of the Choice Clauses. Opp. 13-14. The Ninth Circuit did not address that argument, which Lloyd's did not raise — and therefore waived — in the district court. The United States securities regulator, furthermore, demonstrates that this argument is wrong. *See* SEC Reh'g Mem., App. M. *infra*, 10a-11a.

* * *

The importance of review in this case for the enforcement of federal (and state) securities statutes cannot be overstated. The SEC has made clear in no uncertain terms its view that enforcement of choice clauses that waive rights and obligations under the securities laws is wrong — and dangerous.[10] So, too, have the securities regulators of all 50 states in their proposed brief *amicus curiae* to this Court.[11] The Chairman of the House Committee on the Judiciary has also expressed his unmistakable disagreement with the result reached by the en banc Ninth Circuit. *See* Pet. 11. And commentators continue to criticize the results reached in the lower courts, including the Ninth Circuit here.[12] Lloyd's Opposition addresses none of those expressed concerns — all of which demonstrate the critical need for immediate review. *See* Pet. 13-16.

The Petition should be granted.

Respectfully submitted,

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10. *See* SEC Br., Pet. App. L, 98a *et seq.*; *see also* SEC Reh'g Mem., App. M, *infra*, 7a-10a.

11. *See* Br. of the North Am. Securities Adm'rs Ass'n, *Amicus Curiae* (June 3, 1998).

12. *See* James D. Cox, *Choice of Law Rules for International Securities Transactions?*, 66 U. CIN. L. REV. (forthcoming June 1998); *see also* articles cited in Pet. 14 n.26.